SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 446

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,
and HERBERT LANG, WILLIAM BOSSINGHAM, DOUGLAS STAUFFER, E. V KEISLING and OMAR SENIFF,
Petitioners,

vs.

ROBERT J. THOMPSON, PAUL IUTZI, IVAN W. HIESER, VIRGIL L. JOHNSON, RICHARD H. GILBERT, DAVID W. BRITTON and JULIUS C. BRISTOW,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois.

JACK C. VIELEY,
1900 Savings Center Tower,
411 Hamilton Boulevard,
Peoria, Illinois 61602,
Attorney for Petitioners.

Of Counsel:

SWAIN, JOHNSON & GARD,
1900 Savings Center Tower,
411 Hamilton Boulevard,
Peoria, Illinois 61602.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101 314-231-4477.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Statutes	2
Statement of the Case	5
Reasons for Granting the Writ	10
Conclusion	13
Appendix A: Illinois Appellate Court Opinion	A-1
Appendix B: Illinois Supreme Court Opinion of which Review is Sought	A-11
Appendix C: Illinois Supreme Court Opinion Denying Petition for Rehearing (Motion for Reconsideration)	A-13
Appendix D: Illinois Supreme Court Opinion	A-14

Cases Cited.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1929) 10, 11

N. A. A. C. P. v. State of Alabama, 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958) 10, 13

People v. Junior College District No. 526, 42 Ill. 2d 136, 246 N. E. 2d 292 (1969) 9, 10

Statutes Cited.

28 U. S. C., Section 1257 (3) 2

28 U. S. C., Section 2101 (c) 2

Illinois Revised Statutes (1967):

Ch. 110, Section 26.1 3

Ch. 110A, Section 301 4

Constitution of the United States:

Fifth Amendment 2

Fourteenth Amendment 3

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. .....

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,
and HERBERT LANG, WILLIAM BOSSINGHAM, DOUGLAS STAUFFER,
E. V. KEISLING and OMAR SENIFF,
Petitioners,

vs.

ROBERT J. THOMPSON, PAUL IUTZI, IVAN W. HIESER, VIRGIL L.
JOHNSON, RICHARD H. GILBERT, DAVID W. BRITTON
and JULIUS C. BRISTOW,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Illinois.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered on May 13, 1969, denying Petitioners' petition for rehearing and adhering to its original opinion rendered on March 13, 1969.

OPINIONS BELOW.

The opinion of the Appellate Court (Appendix A, *infra*, p. A-1) was filed on November 18, 1968, and is reported at 101 Ill. App. 2d 104, 242 N. E. 2d 49. A timely petition

for leave to appeal from the Appellate Court to the Supreme Court of Illinois was filed by the Petitioners. The order of the Supreme Court of Illinois (Appendix B, *infra*, p. A-11) denying the petition for leave to appeal was entered on March 13, 1969; this order is unreported. A timely petition for rehearing (treated as a motion for reconsideration) was filed by the Petitioners. The order of the Supreme Court of Illinois (Appendix C, *infra*, p. A-13) denying the petition for rehearing (motion for reconsideration) was entered on May 13, 1969; this order is unreported.

JURISDICTION.

The judgment of the Supreme Court of Illinois sought to be reviewed was pronounced on March 13, 1969, and was entered on the same date. The order of the Supreme Court of Illinois denying the petition for rehearing was made and entered on May 13, 1969. The jurisdiction of this Court to review the judgment or decree in question by Writ of Certiorari is conferred by 28 U. S. C., Section 1257 (3). This Petition for Certiorari is filed within the time allowed by 28 U. S. C. 2101 (c).

QUESTION PRESENTED.

Did the judgment rendered by the Supreme Court of Illinois deny the petitioners and other citizens, voters, and taxpayers in the purported school district due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America?

CONSTITUTIONAL PROVISIONS AND STATUTES.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., Ch. 110, Section 26.1 (1967).

(1) Upon timely application anyone shall be permitted as of right to intervene in an action: (a) when a statute confers an unconditional right to intervene; or (b) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by a judgment, decree or order in the action; or (c) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or an officer thereof.

(2) Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (a) when a statute confers a conditional right to intervene; or (b) when an applicant's claim or defense and the main action have a question of law or fact in common.

(3) In all cases involving the validity of a constitutional provision, statute or regulation of this State and affecting the public interest, the State upon timely application may in the discretion of the court be permitted to intervene.

(4) In all cases involving the validity of an ordinance or regulation of a municipality or governmental subdivision of this State and affecting the public interest, the municipality or governmental subdivision upon timely application may in the discretion of the court be permitted to intervene.

(5) A person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he proposes to file. In cases in which the allowance of intervention is discretionary, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(6) An intervenor shall have all the rights of an original party, except that the court may in its order allowing intervention, whether discretionary or a matter of right, provide that the applicant shall be bound by orders, judgments or decrees theretofore entered or by evidence theretofore received, that the applicant shall not raise issues which might more properly have been raised at an earlier stage of the proceeding, that the applicant shall not raise new issues or add new parties, or that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require.

Ill. Rev. Stat., Ch. 110A, Section 301 (1967).

Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. All rights that

could have been asserted by appeal or writ of error may be asserted by appeal. No formal exception need be taken in order to make any ruling or action of the court reviewable.

STATEMENT OF THE CASE.

On August 5, 1966, a petition was filed with the County Superintendent of Schools of McLean County, Illinois, calling for an election for the purpose of voting for or against the establishment of a community unit school district (Volume II, Exhibit A). On September 15, 1966, a public hearing on said petition was held by the County Superintendent of Schools of McLean County, Illinois, and on September 16, 1966, the County Superintendent of Schools entered an order granting said petition (Volume II, Exhibits C and D). The organizational election was held on November 12, 1966, and on November 15, 1966, the County Superintendent of Schools canvassed the results and declared that the proposition had carried (Volume II, Exhibits F and G).

On November 21, 1966, the County Superintendent of Schools designated the name of the purported new school district to be "Community Unit School District No. 16 in McLean, Woodford, DeWitt, Logan and Tazewell Counties, Illinois" (Volume II, Exhibit G). On January 21, 1967, an election was held to elect the Board of Education for the purported Community Unit School District No. 16; the results of said election were declared on January 24, 1967 (Volume II, Exhibit J). On July 1, 1967, the newly elected Board of Education commenced operation of Community Unit School District No. 16 (Volume III, pages 84 and 88).

On December 22, 1967, the People of the State of Illinois, by the State's Attorney of McLean County, Illinois, commenced a proceeding in Quo Warranto against the Respondents as members of the Board of Education (Volume

I, C-6). In substance the Complaint in Quo Warranto challenged the validity of the purported Community Unit School District No. 16 and the election of its Board of Education. On December 28, 1967, the Respondents filed their Answer and Pleas (Volume I, C-9). The People of the State of Illinois filed a Reply on December 29, 1967 (Volume I, C-22). On December 29, 1967, a hearing on the merits was held before the Honorable Walter A. Yoder, Circuit Judge of the Circuit Court of the Eleventh Judicial Circuit, in McLean County, Illinois; the relief prayed for in the Complaint in Quo Warranto was denied, and the Respondents were found to be lawfully in possession of their offices (Volume I, C-32). A decree was entered by Judge Yoder on January 8, 1968, which ordered and declared that the purported Community Unit School District No. 16 was a legally created community unit school district pursuant to the School Code of Illinois, and which sustained the validity of the offices held by the Respondents (Volume I, C-36).

In the latter part of January, 1968, the Petitioners, who are taxpayers and voters in the purported school district, retained the services of the law firm of Swain, Johnson & Gard to assist the State's Attorney of McLean County in prosecuting the Quo Warranto action. Subsequently, the law firm of Swain, Johnson & Gard contacted the State's Attorney of McLean County and offered their assistance to him. The State's Attorney indicated that the Quo Warranto action was meritorious and that serious legal defects existed in the organization of the purported Community Unit School District No. 16. It was agreed that Swain, Johnson & Gard would assist the State's Attorney in filing the necessary motions, briefs, and other documents, and it was also agreed that in the event Judge Yoder sustained the validity of the purported school district, then the State's Attorney, with the assistance of Swain, Johnson & Gard, would appeal the case to either the

Illinois Appellate or Supreme Court (Volume III, page 223).

On February 6, 1968, a Motion to Vacate the Decree entered January 8, 1968, was filed by the State's Attorney (Volume I, C-49). On February 21, 1968, the State's Attorney's Motion to Vacate was called for hearing before Judge Yoder, and the law firm of Swain, Johnson & Gard filed its Motion for Leave to Enter as Additional Counsel for Plaintiff. Both Motions were heard and the ruling was reserved to a later date by Judge Yoder (Volume I, C-56; Volume III, Page 137).

The law firm of Swain, Johnson & Gard continued to do research on the Quo Warranto action, and the relationship between the State's Attorney and Swain, Johnson & Gard was cordial until on or about April 9, 1968. A few days prior to that time, the State's Attorney had telephoned Mishael O. Gard and indicated that he might not appeal an adverse decision and that he might discontinue further work on the case (Volume III, Page 223). On April 9, 1968, several of the Petitioners, Mishael O. Gard and Jack C. Vieley met in the office of the State's Attorney and discussed, among other things, the possibility of his discontinuance of further legal action. Mishael O. Gard indicated that it was his desire to file a Petition for Leave to Intervene. The State's Attorney promised the Petitioners, Mishael O. Gard and Jack C. Vieley that in the event that Judge Yoder denied the Petition for Leave to Intervene, then the State's Attorney would proceed with the appeal of the case (Volume III, Page 224). On April 9, 1968, the Petitioners filed their Petition for Leave to Intervene (Volume I, C-144).

On April 15, 1968, Judge Yoder entered an Order on Motion whereby he denied Swain, Johnson & Gard's Motion for Leave to Enter as Additional Counsel for Plaintiff (Volume I, C-162). On May 1, 1968, Judge Yoder entered an Order Denying Petition for Leave to Intervene

(Volume I, C-204). On May 6, 1968, Judge Yoder entered an Order Denying Petition to Vacate Decree (Volume I, C-208). The Petitioners filed a Motion to Vacate the Order Denying the Petition for Leave to Intervene on May 29, 1968 (Volume I, C-212).

During the last two weeks of May, 1968, it became extremely difficult for Swain, Johnson & Gard and the Petitioners to contact the State's Attorney. On various occasions Mishael O. Gard and Jack C. Vieley attempted to telephone him, and Jack C. Vieley made at least two separate trips to Bloomington to speak to him. During those visits the State's Attorney indicated that he was extremely busy with his campaigning and his work on certain criminal cases (Volume III, Page 225). Some of the Petitioners came to Bloomington to speak with the State's Attorney, and they found him extremely difficult to speak to and evasive (Volume III, Page 243).

On June 3, 1968, the office of the State's Attorney notified Swain, Johnson & Gard that there would be no appeal taken by the State's Attorney and that any further action in the case would have to be taken by the Petitioners and their attorneys (Volume III, Page 225). On June 13, 1968, the State's Attorney failed to appear for oral argument of the Petitioners' Motion to Vacate Order Denying Petition for Leave to Intervene (Volume III, Page 219).

On June 5, 1968, the Petitioners filed their Notice of Appeal to the Appellate Court of Illinois, Fourth District (Volume I, C-266). On June 14, 1968, Judge Yoder entered an Order Denying Motion to Vacate Earlier Order Denying the Petition for Leave to Intervene (Volume I, C-275). On July 11, 1968, the Petitioners filed their Notice of Appeal to the Appellate Court of Illinois, Fourth District, from the Orders entered on May 1, 1968, and June 14, 1968 (Volume I, C-277).

In the Appellate Court, the Respondents petitioned the Illinois Supreme Court to invoke Illinois Supreme Court Rule 302 (d) to transfer the appeal to the Illinois Supreme Court and to permit the filing before that court of the Respondents' Motion to Dismiss Appeal. The Illinois Supreme Court denied the Respondents' request on September 25, 1968.

The Petitioners filed their brief in the Illinois Appellate Court following this ruling, and the Respondents thereupon filed their Motion to Dismiss Appeal. The matter was argued before the Appellate Court on the Respondents' Motion to Dismiss, and the opinion of that court was rendered on November 18, 1968 (Appendix, *infra*, p. A-1).

The Petitioners filed their Petition for Leave to Appeal in the Illinois Supreme Court on January 13, 1969, but their Petition was denied on March 13, 1969. In denying the Petition the Illinois Supreme Court apparently relied upon **People v. Junior College District No. 526**, 42 Ill. 2d 136, 246 N. E. 2d 292 (1969) which was entered on March 13, 1969 (Appendix D, *infra*, p. A-14). On April 7, 1969, the Petitioners filed their timely Petition for Rehearing (treated as a motion for reconsideration) in the Illinois Supreme Court, and on May 13, 1969, this Petition was denied.

The Federal question sought to be reviewed was raised in the Illinois Appellate Court during oral argument of the Respondents' Motion to Dismiss Appeal. The Federal question was raised in the Illinois Supreme Court in the Petitioners' Petition for Rehearing (motion for reconsideration).

REASONS FOR GRANTING THE WRIT.

1. The decisions rendered by the Illinois Appellate and Supreme Courts deny the Petitioners and other citizens, voters, and taxpayers in the purported school district due process of law as guaranteed by the Constitution of the United States. Until the entry of **People v. Junior College District No. 526**, 42 Ill. 2d 136, 246 N. E. 2d 292 (1969), and the order denying the Petition for Leave to Appeal, both being entered on March 13, 1969, the Illinois Supreme Court had consistently held that a school district must be in existence for a long period of time, such as two years, three years, five years, ten years, or thirteen years, before the defense of laches could be successfully asserted, and then laches could be asserted only when public detriment or inconvenience would result from a judgment of ouster. The State's Attorney and the Petitioners relied upon these prior, controlling Illinois decisions on laches, but now the Illinois Supreme Court has apparently held that a period of approximately six months delay constitutes laches, e. g., the remedy of quo warranto exists, but it must be exercised within a period of time less than six months. Such a ruling in view of the compelling circumstances of the case at bar constitutes a denial to the Petitioners and other citizens, voters, and taxpayers of procedural due process of law, using that term in its primary sense of an opportunity to be heard and to defend and maintain their substantive rights in the quo warranto action. **Brinkerhoff-Faris Trust & Sav. Co. v. Hill**, 281 U. S. 673, 678, 74 L. Ed. 1107, 1112, 50 S. Ct. 451 (1929); **N. A. A. C. P. v. State of Alabama**, 357 U. S. 449, 457, 458, 2 L. Ed. 2d 1488, 1496, 1497, 78 S. Ct. 1163 (1958).

2. The Petitioners have erroneously been denied their right to appeal the merits of the quo warranto action. The Illinois Appellate and Supreme Courts have com-

pletely ignored the mandate of Illinois Supreme Court Rule 301 that "every final judgment of a circuit court in a civil case is appealable as of right . . ." The Petitioners appealed to the Illinois Appellate Court from the trial court's order denying them leave to intervene in the quo warranto proceeding, and the Respondents filed their motion to dismiss the appeal. Since Illinois Supreme Court Rule 301 provides that "every final judgment of a circuit court in a civil case is appealable as of right . . .", the effect of such a motion at the appellate level was to question whether the Petitioners had any right to appeal. The Illinois Appellate and Supreme Courts were therefore in error when they purported to affirm the judgment of the trial court following **only** oral argument on a motion which merely raised the question of the Petitioners' right to appeal. The rationale and holding of **Brinkerhoff-Faris Trust & Sav. Co. v. Hill** is applicable to the case at bar. The Supreme Court held at 281 U. S. 682, 74 L. Ed. 1114:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

3. To deny the Petitioners their right to appeal and argue the merits of this action is tantamount to denying all of the citizens, voters, and taxpayers of the purported school district their right to appellate review of the merits of the cause. When the State's Attorney failed to properly prosecute the case, the Petitioners became the true representatives of all of the citizens, voters, and taxpayers within the purported school district. The Petitioners then

became the true plaintiffs in the case, and as such have the right and responsibility to review the merits of the case before either the Illinois Appellate or Supreme Court.

Certainly the principles of fundamental fairness and justice dictate that the citizens, voters, and taxpayers of the purported school district have a right to judicial review of the merits of the cause and that this right should not be denied them because of the inadequate representation of the case by the State's Attorney. The Petitioners stand ready to vindicate the interest of the public in this case by appellate review of the merits. Such review should be allowed.

4. Unless the Petitioners are allowed to intervene and appeal the merits of this cause, the Petitioners and the class of citizens and taxpayers whom they represent will have been denied their day in court and their opportunity to be heard, and they will have been deprived of all existing remedies to contest the validity of the purported school district. The trial court's decree regarding the validity of the purported district will bind the entire class of citizens, voters, and taxpayers in that district because the State's Attorney filed the quo warranto suit on behalf of the People of the State of Illinois and because the State's Attorney is a representative of a class of citizens, voters, and taxpayers, including the Petitioners, residing in the purported school district. Thus the issue of the validity of the purported school district will become res judicata under Illinois law, and the Petitioners will be precluded from bringing any subsequent collateral suit to contest the validity of the purported district.

Intervention is the only avenue of attack in this cause left open to the Petitioners at this stage of the litigation. As a matter of Constitutional law the closing of this last avenue on the basis of new, novel procedural requirements cannot be done by the Illinois Appellate or Supreme Court.

"Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." **N. A. A. C. P. v. State of Alabama,** 357 U. S. 449, 457, 458, 2 L. Ed. 2d 1488, 1496, 1497, 78 S. Ct. 1163 (1958).

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JACK C. VIELEY,
Counsel for Petitioners.

August 7, 1969.

APPENDIX

APPENDIX A.

STATE OF ILLINOIS.

APPELLATE COURT.

At an appellate court, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

Present

Honorable Samuel O. Smith, Presiding Judge

Honorable Harold F. Trapp, Judge

Honorable James C. Craven, Judge

Attest: Robert L. Conn, Clerk.

Be it remembered, that to-wit: On the 18th day of November A. D. 1968, there was filed in the office of the Clerk of the Court an opinion of said Court, in words and figures following:

General No. 11067.

STATE OF ILLINOIS,
IN THE APPELLATE COURT,
FOURTH DISTRICT.

People of the State of Illinois,
Plaintiff-Appellee,

and Herbert Lang, William Bossingham, Douglas Stauffer, E. V. Kelsling and Omar Seniff,
Petitioners-Intervenors-Appellants,

v.

Robert J. Thompson, Paul Iutzi, Ivan W. Hieser, Virgil L. Johnson, Richard H. Gilbert, David W. Britton and Julius C. Bristow,
Defendants-Appellees.

Agenda No. 68-71.

Appeal from Circuit Court Eleventh Judicial Circuit.

Smith, P. J.

This is an appeal by five taxpayers and voters from an order of the circuit court denying them leave to intervene in a quo warranto proceeding after a judgment sustaining the validity of the district. The State's Attorney filed the original quo warranto proceeding. The defendants are members of the Board of Education of the newly organized district. The appellees filed their motion to dismiss the appeal accompanied by a supporting brief. Appellants answered. We set the motion for oral argument indicating questions we desired argued orally. Appellants filed their brief on the merits of this appeal. Since the appellants were not original parties to the quo warranto proceeding and are not parties now, the merits

of that judgment are not before this court. Strader v. Board of Education, etc., 413 Ill. 610, 110 N. E. 2d 191. Indeed the notice to appeal in this case is specifically limited to the order denying the appellants leave to intervene in that court. We thus consider whether they have sufficient interest in the original quo warranto to intervene for purposes of appeal and whether or not the trial court abused his discretion in denying their petition.

The decree establishing the district was entered on January 8, 1968. While the State's Attorney's motion to vacate the original decree in quo warranto was pending, counsel for the appellants sought leave to be entered as additional counsel of record. After the State's Attorney indicated he might not appeal an adverse decision on his motion to vacate the original decree, appellants sought leave to intervene for purpose of prosecuting an appeal. The motion for leave to be added as additional counsel was denied and the petition for leave to intervene was denied. It is conceded that the representation by the State's Attorney was adequate to the time when he indicated that no appeal would be taken.

It seems reasonably clear that unless someone has the authority to appeal the trial court's original decree, the organization of this new school district is an accomplished fact. Any doubt existing from previous decisions that the petitioners as taxpayers and voters have sufficient interest to present their petition for leave to intervene has been removed. People v. Firek, 5 Ill. 2d 317, 125 N. E. 2d 637. People ex rel. Henderson v. City of Bloomington, 38 Ill. App. 2d 9, 186 N. E. 2d 159. In Strader after holding that the original decree in quo warranto was not before the court on a petition to intervene, the Supreme Court refused jurisdiction on direct appeal and transferred the case to the Appellate Court. 351 Ill. App. 438, 115 N. E. 2d 539. In that court, it was held that a denial of a petition for leave to intervene where it was apparent

from the record that further litigation would ensue was an abuse of discretion. In People ex rel. Boyington v. Northfield Tp. High School District No. 225, 402 Ill. 435, 84 N. E. 2d 553, the petitioners, not original parties, after judgment filed a petition to intervene accompanied by a motion to vacate the judgment finding the district to be validly organized. It was held there that it was not an abuse of discretion to permit intervention.

In People v. Wood, 411 Ill. 514, 104 N. E. 2d 800, the Supreme Court was confronted with a motion by the State's Attorney to dismiss an appeal somewhat similar to the one that we review. In that case, the State's Attorney filed a proceeding in quo warranto to test the validity of a school district. The court found it to be legally organized. The State's Attorney elected to abide by that judgment and took no appeal. An underlying school district involved in the decision filed notice of appeal and was the only appellant in the Supreme Court. It was not a party to the original action. The Supreme Court traced the history of the nature of quo warranto and its growth and development. The court recognized that at the time of its decision a writ of error provided a means of review under former practice to non-parties who could show that they were directly injured by the judgment. The court further recognized that the appellant in that case had an interest which in a certain sense was not common to every other member of the public. The court conceded that the denial of the right to appeal in that case might appear to be a technicality, but that actually it was based on sound, practical considerations. In so doing, the court stated in substance that the vesting of the power to institute, dismiss or appeal a quo warranto proceeding rests with the State where purely public rights are concerned, that it avoids the confusion and conflict which would occur if others could interfere at some stage of the proceeding or if control of the quo warranto remedy

was to vest in other hands, and that these rules and principles which have evolved have the effect of avoiding conflicts and disputes between state officers and state entities, and that quo warranto actions are founded upon practical considerations which should not be lightly overturned. It further stated in substance that to permit the appeal in that case because of zealousness to insure review would be to let the right of appeal transcend the action sought to be reviewed at the cost of altering the substance and procedure of the action itself. Paragraph two of the present statute, Ill. Rev. Stat., ch. 112, ¶ 10, makes it abundantly clear that a citizen having an interest in the litigation is prohibited from instituting or maintaining quo warranto where the State's Attorney has instituted such a proceeding for the same purpose. An individual citizen or group of citizens with an interest may not maintain the action unless the State's Attorney or Attorney General has refused to do so and then only with leave of court. W do not find any case where the principles stated in Wood have been superseded, modified or altered as to the control of a quo warranto proceeding instituted by the State's Attorney or Attorney General. It is not the province of this court to overrule it and if we could, we would not for reasons that follow.

The petitioners here say, however, that this actually deprives them of a right to appeal and the right to be heard in the reviewing court and that this is neither fair nor just. They point out that under ch. 110, § 26.1, Ill. Rev. Stat. 1967, a person has the right to intervene in an action when "(b) . . . the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by a judgment, decree or order in the action". They suggest that this section is clearly applicable where, as here, the People have abandoned or refused to take an appeal and thus for the first time the representation of the petitioners is no longer

adequate. In this context, representation wholly absent must be deemed inadequate. We do not think petitioners can be charged with undue delay or laches in seeking to intervene in this suit after it was begun. Until the refusal to appeal they were adequately represented. We would further observe that permitting these petitioners to intervene for purposes of appeal would not delay the ultimate determination of the quo warranto proceeding on the merits any longer than had the State's Attorney elected to prosecute an appeal.

These observations, however, do not with any degree of finality control our decision. In Wood we have observed that the control of litigation in quo warranto instituted by the State's Attorney or Attorney General reposes with that officer. Under Ill. Rev. Stat. 1967, ch. 110, § 26.1, our legislature has preserved this control in ¶ (6) where it states that the trial court in allowing intervention may provide "that in other respects the applicant shall not interfere with the control of the litigation, as justice and the avoidance of undue delay may require". It seems to us that under this proviso even if the trial court had permitted intervention, the intervenors could not control the litigation unless justice required it. Justice requires a weighing of the interest sought to be protected by the intervenors with the public interest. Indeed in Firek the court points out that in the exercise of a judicial discretion on a petition for leave to file an information in quo warranto, the court may fully protect the rights of the public, and under some circumstances, where the public deal demands, refuse leave to file the information although the clear legal right of the intervenor is established. (Citing McPhail v. People, 160 Ill. 77.) In both Wood and in the Appellate Court decision in Strader, it is noted that sound practical considerations are necessarily involved.

In the case at bar, the record indicates that the organizational petition was filed August 5, 1966. The public hear-

ing was conducted on September 15, 1966. On November 12, the organizational election was held. On November 15, the organizational election was canvassed and the tabulation shows 2,455 for and 672 against the organization of the new district. On January 21, 1967, a Board of Education was elected. On January 30, the organization meeting of the Board was held. On July 1, 1967, the new Board commenced the operation of the district and succeeded to the powers and duties of the Boards of Education of the five underlying community unit districts. The quo warranto proceeding was not instituted until December 27, 1967. No one questioned the validity of this district until some months after it had begun to function and after the underlying districts had ceased their functions. It is surely not debatable that the validity of a new municipal entity ought to be tested at the first possible moment. In Iowa, the instant petition would have been barred, if not filed within six months. Swan Lake Consolidated School District v. Consolidated School District, 244 Iowa 1269, 58 N. W. 2d 349. Michigan has a thirty-day statute. Fulton Township School District v. School District of Essex, 302 Mich. 566, 5 N. W. 2d 467. In this State, we are not aided by such a statute. We are aided, however, by the language of the Supreme Court in People ex rel. Lindsey v. Board of Education, 3 Ill. 2d 159, 168, 120 N. E. 2d 887, where the Supreme Court observed "We can and do see, however, great potential harm to the public generally in permitting the State to challenge the legality of the organization of a municipality without regard to the passage of time. If a judgment of ouster can be entered at any time, however remote, for an irregularity in the organization of a municipality, and all the acts of its officers invalidated, the credit of the municipality generally may be so hampered that they will be unable to perform the public functions for which they are created". The Supreme Court referred to the Lindsey case in People ex rel. Jordan v. Village of Forest View, 21 Ill. 2d 384, 390, 172 N. E. 2d 780, 784, and

there stated that the Lindsey decision was not based on either the lapse of time or the acquiescence of the plaintiffs, but "rather, the fact that, during the period of delay and acquiescence certain action had been taken by the district and certain conditions had developed whereby great inconvenience and public detriment would result from a judgment of ouster. . . ."

In the light of these principles, the record shows that the new district took over all of the assets and liabilities of the underlying five districts on July 1, 1967, has hired a superintendent, teachers and other personnel, has levied taxes for the operation of the district, has assumed the ownership and operation of the transportation equipment, has secured an option on a site for a new building, has by election voted the funds for such a building, has incurred obligations for architects and engineers, has received a federal grant for both elementary and secondary schools, that further applications are now pending, that the education of some 3,000 elementary and secondary students are involved, that the status of such students in graduating from an accredited high school as a condition precedent to the pursuit of a higher education is involved, and, in summary, the destruction of the new district would create a chaos comparable to Lindsey.

We further observe that the organization of the school district under the statute imposes a rigid time schedule for the creation of a new district. It seems to us reasonable diligence in testing corporate existence should be imposed upon prospective intervenors and that "justice" so requires. Appellants complain that the trial court did not pass on the issues raised as to the legality of the district, but assert that it held that "it is a valid district if the new administration takes office, begins to spend money, enters into contracts, levies taxes and plans for the construction of a multimillion dollar school building". Assuming, without deciding, the correctness of this con-

clusion, perhaps the trial court had Lindsey in mind. Appellants stated squarely to the trial court that they thought the State's Attorney had done a very fine job at the trial level. "However, our problem is simply . . . that he is not going to appeal". It seems therefore clear to us that there is no abuse of discretion to deny the petition for leave to intervene where such petition on its face suggests that the intervenor can only wind up in a dead-end street. It is a dead-end street for very practical reasons. The number of local governmental units now authorized under our statutes are many. The final and the effective determination that they do or do not exist as lawful corporate units should be determined as expeditiously as possible. This district was declared in existence on November 15, 1966. Its Board of Education was elected in January, 1967. The State's Attorney and these taxpayers sat supinely by until December, 1967. It is clear from this record that the State's Attorney did not move until the bonding company raised some questions about imperfections in the organization of the district some eleven months after its organization. Quo warranto is standard procedure for removing such imperfections. Until the decree holding the organization of the district valid, these taxpayers did not move in court. They are now unhappy with the result. The State's Attorney, under whose sole control the proceeding was up to this point, has elected not to take an appeal. Someone has to make a decision to appeal or not to appeal. It was made by the one clothed with the power to make it. These taxpayers now seek to review, not only this right of the State's Attorney, but the decision of the court. Suppose that they were granted leave to intervene for the purpose of an appeal and in the process finally conclude that the trial court's decision was correct and abandon the appeal. Could five other taxpayers come in and say "Well, we've been happy until now, but we are now without representation in court. Since the State's Attorney decided not to

appeal and our five colleagues have quit, we would like to intervene for the purpose of prosecuting an appeal'' and so on ad infinitum. The legality or the illegality of the corporation's existence under such circumstances would be forever fluid. For the reasons stated in Wood and because of chaos comparable to that outlined in Lindsey, we hold that the trial court did not abuse his discretion in denying petitioners leave to intervene in this proceeding for the sole purpose of appeal. We do not imply that there may not be circumstances where it would be an abuse of discretion to deny intervention either before or after judgment in a quo warranto proceeding begun by the State's Attorney. It is sufficient to say that they are not here present. The judgment of the trial court is affirmed.

Affirmed.

Trapp, J. and Craven, J. concur.

APPENDIX B

(Seal)

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

Justin Taft
Clerk

Telephone
Area Code 217
525-2035

March 18, 1969

Mr. Jack C. Vieley
Attorney at Law
Swain, Johnson & Gard
411 Hamilton Boulevard
Peoria, Illinois 61602

In re: People State of Illinois, respondent (Herbert Lang, et al., petitioners) vs. Robert J. Thompson, et al., respondents. No. 41898.

People State of Illinois, appellant vs. Junior College District No. 526, etc., et al., appellees. No. 41916.

Dear Mr. Vieley:

In response to your March 17 letter concerning copies of opinions in the above entitled causes, in case No. 41898, on March 13, 1969 the Court made the following announcement:

"The motion by respondents for immediate disposition of this case is allowed. The petition for leave to appeal is denied. (See opinion in case No. 41916, People State of Illinois, appellant vs. Junior College

District No. 526, etc., et al., appellees, announced this date)."

We enclose a copy of the opinion handed down by the Illinois Supreme Court, March 13, 1969, in case No. 41916. The authorized charge for such copy is $1.00, for which remittance will be appreciated at your early convenience.

Very truly yours,

Justin Taft,
Clerk of the Supreme Court.

JT:hw

Enc.

APPENDIX C

(Seal)

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

Justin Taft
Clerk

Telephone
Area Code 217
525-2035

May 13, 1969

Messrs. Swain, Johnson & Gard
Attorneys at Law
1900 Savings Center Tower
Peoria, Illinois 61602

Gentlemen:

In Supreme Court today, in case No. 41898 entitled

People State of Illinois,
respondent,
Herbert Lang, et al.,
petitioners,

vs.

Robert J. Thompson, et al.,
respondents.

motion by petitioners for reconsideration of order denying petition for leave to appeal was denied.

Very truly yours,

Justin Taft,
Clerk of the Supreme Court.

APPENDIX D.

OPINION.

SUPREME COURT OF ILLINOIS.

United States of America.

State of Illinois, } ss.
Supreme Court. }

At a term of the Supreme Court, begun and held in Springfield, on Monday, the eleventh day of March in the year of our Lord, one thousand nine hundred and sixty-nine, within and for the State of Illinois.

Present: Roy J. Solfisburg, Jr., Chief Justice

Justice Walter V. Schaefer

Justice Byron O. House

Justice Thomas E. Kluczynski

Justice Ray I. Klingbiel

Justice Robert C. Underwood

Justice Daniel P. Ward

William J. Scott, Attorney General

Robert G. Miley, Marshal

Attest: Justin Taft, Clerk

Be it remembered, that afterwards, to-wit, on the 13th day of March, 1969 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

People State of Illinois,
Appellant,
No. 41916 v.
Junior College District No. 526, etc., et al.,
Appellees.

Appeal from Circuit Court, Sangamon County.

Docket No. 41916—Agenda 44—January, 1969.

The People of the State of Illinois, Appellant, v. Junior College District No. 526 et al., Appellees.

Mr. Justice Schaefer delivered the opinion of the court:

The State's Attorney of Sangamon County filed a complaint in *quo warranto* against Junior College District No. 526 and the individual members of its board. The complaint challenges the incorporation of the junior college district and its subsequent annexation of Springfield Special Charter District No. 186. After answer, reply, and a hearing, the circuit court entered judgment for the defendants. A constitutional question is involved, and the State's Attorney has appealed directly to this court.

On October 12, 1966, a petition was filed with the Illinois Junior College Board requesting that an election be held to determine whether a junior college district should be established in the described territory which embraced land in several counties. That territory completely surrounded, but did not include, the territory of Springfield Special Charter District No. 186 which is composed of the city of Springfield. After study the State board approved the petition and referred it to the Board of Higher Education which found the proposed junior college district to be in conformity with a comprehensive junior college program. After a public hearing the State board granted the petition and a referendum election was held on February 25, 1967. A majority of the votes cast at the

election favored creation of the junior college district. No petition for administrative review of the State board's approval of the petition was filed. Thereafter, on April 22, 1967, the seven members of the board of the newly created Junior College District No. 526, who are the individual defendants, were elected.

On December 19, 1967, a petition signed by two thirds of the members of the board of Springfield Special Charter District No. 186 was filed with the county superintendent of schools of Sangamon County, requesting that the territory of that district be annexed to the junior college district. The county superintendent submitted the petition to the State board which approved it on January 12, 1968. Notice was published that anyone wishing to have the proposed annexation submitted to a referendum must file a petition signed by ten percent of the resident voters of the annexed territory within 30 days of publication of the notice. No petition was filed and the territory was declared annexed on March 25, 1968.

The plaintiff contends that the original incorporation of the junior college district, completely surrounding but omitting District No. 186, violated the requirement of the Public Junior College Act that the territory of such a district be "compact and contiguous for college purposes" (Ill. Rev. Stat. 1967, ch. 122, par. 103—3), and also violated section 1 of article VIII of the constitution of Illinois which provides for a thorough and efficient system of free schools. With respect to the annexation of District No. 186, he does not dispute that the requirements of sections 6—5.6, 6—5.7 and 6—5.8 of the Act (Ill. Rev. Stat. 1967, ch. 122, pars. 106—5.6, 106—5.7, 106—5.8), under which the annexation took place, where fully complied with. He does contend, however, that those sections are unconstitutional as special legislation because, at the time the sections were added to the Act, District No. 186

was the only one surrounded by a junior college district, and because those sections place upon the voters of District No. 186 the burden of petitioning for a referendum on the issue of annexation. Finally, he argues that sections 6—5.7 and 6—5.8 were not adopted in accordance with section 13 of article IV of the constitution of Illinois.

The defendants have answered each of these contentions on the merits. They also contend that this *quo warranto* action is barred by *laches*.

The following considerations are advanced to support their contention of *laches*. This action was commenced on January 2, 1969, nearly two years after the junior college district was originally organized. In the interim its board has levied and collected taxes for the years 1967 and 1968 and has expended these monies to establish the Lincoln Land Junior College. The board budgeted $415,000 for the fiscal year ending June 30, 1968, and $1,145,239 for the fiscal year ending June 30, 1969. Land has been leased, and contracts have been entered into for the purchase of buildings and facilities for a temporary campus. A faculty and administrative personnel have been employed, and over 1500 students have enrolled and are now attending classes. On December 7, 1968, the voters of the junior college district approved a $5.9 million bond issue by a three to one majority. The board has available $2.3 million for a permanent campus, and condemnation proceedings are currently under way.

Laches will not ordinarily bar an action in *quo warranto* brought on behalf of the people. But if, as a result of inexcusable delay and public acquiescence, a judgment of ouster would result in great public inconvenience and detriment, the public interest requires that *laches* be applied in bar of the proceeding. (*People ex rel. Lindsey v. Board of Education*, 3 Ill. 2d 159; *People ex rel. Zimmerman v. Jones*, 308 Ill. 246.) Such is the case here.

Adequate notices were given and the actions of the board were matters of public record. Termination of operations of the board would deny a large population access to a junior college.

Our conclusion that this action is barred by *laches* in no way indicates disagreement with the conclusions of the circuit court upon the merits of the case. The judgment of the circuit court of Sangamon County is affirmed.

Judgment affirmed.

LIBRARY
SUPREME COURT, U. S.

SEP 18 1969
JOHN F. DAVIS, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 446

PEOPLE OF THE STATE OF ILLINOIS

Respondent,

and HERBERT LANG, WILLIAM BOSSINGHAM, DOUGLAS STAUFFER, E. V. KEISLING and OMAR SENIFF,

Petitioners,

vs.

ROBERT J. THOMPSON, PAUL IUTZI, IVAN W. HEISER, VIRGIL L. JOHNSON, RICHARD H. GILBERT, DAVID W. BRITTON and JULIUS C. BRISTOW,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH H. LEMMER
Professional Building
Havana, Illinois 62644

WILLIAM M. GOEBEL
600 Peoples Bank Building
Bloomington, Illinois 61701
Attorneys for Respondents

Of Counsel:

LEMMER, VELDE, BOGGS, & KREBAUM
Professional Building
Havana, Illinois 62644

DUNN, DUNN, BRADY, GOEBEL, ULBRICH & HAYES
600 Peoples Bank Building
Bloomington, Illinois 61701

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 446

PEOPLE OF THE STATE OF ILLINOIS

Respondent,

and HERBERT LANG, WILLIAM BOSSINGHAM, DOUGLAS STAUFFER, E. V. KEISLING and OMAR SENIFF,

Petitioners,

vs.

ROBERT J. THOMPSON, PAUL IUTZI, IVAN W. HEISER, VIRGIL L. JOHNSON, RICHARD H. GILBERT, DAVID W. BRITTON and JULIUS C. BRISTOW,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully pray that the Petition for Writ of Certiorari filed in this cause be denied.

STATEMENT OF THE CASE

The objective of the Petitioners as shown by the record in this case is to have declared invalid the organization of a community unit school district whose territory comprises approximately 385 square miles situated within five contiguous counties in the State of Illinois. The organization of the district became effective on November 15, 1966 (Rec. Vol. II Exhibit F) and said school district was declared established and was named Community Unit School District No. 16, in McLean, Woodford, DeWitt, Logan and Tazewell Counties, Illinois, on November 21, 1966 (Rec. Vol. II Exhibit G).

On December 22, 1967, the State's Attorney of McLean County, Illinois, commenced a quo warranto proceeding in the name of the People of the State of Illinois to contest the organization of the school district (Rec. Vol. I, pp. C7-8) against the Respondents herein who are the members of the Board of Education of said school district.

Upon trial of the cause, the court, by decree entered January 8, 1968, found the district to be valid and the Respondents not guilty of unlawful usurpation of the powers of the board of education (Rec. Vol. I, pp. C36-48). Under Illinois law such a decree is not subject to appeal after 30 days from the entry thereof (Ill. Rev. Stat. Ch. 110, Sec. 72) absent an appropriate post trial motion.

The State's Attorney filed a Motion to Vacate on February 6, 1968 (Rec. Vol. I, pp. C49-53).

On February 21, 1968, the law firm of Swain, Johnson & Gard as attorneys for persons undisclosed filed their motion to be made additional counsel for the People of the State of Illinois. The trial court took both motions

under advisement and exhaustive briefs were filed relative thereto (Rec. Vol. I, pp. C57-141).

On April 9, 1968, Petitioners by their attorneys, Swain, Johnson & Gard, filed their Petition for Leave to Intervene (Rec. Vol. I, pp. C144-155) for the purpose of filing a motion to vacate the decree of the trial court entered January 8, 1968. April 9, 1968, was the first time Petitioners made their appearance in the proceeding. On April 15, 1968, the trial court denied the motion of Swain, Johnson & Gard to enter as additional counsel for the People as not authorized by statute (Rec. Vol. I, pp. C160-161), and on May 1, 1968, the court denied Petitioners' Petition for Leave to Intervene.

On May 6, 1968, the court denied the State's Attorney's motion of the People to vacate the quo warranto decree.

Thereafter, Petitioners appealed the order of the trial court denying their Petition for Leave to Intervene. As set forth in Petitioners' Petition for Writ of Certiorari, both the Appellate Court of Illinois, Fourth District, and the Supreme Court of Illinois affirmed the trial court (Pet. for Writ of Cert., Appendix A, pp. A-1-A-10; Appendix D, pp. A-14-A-18).

REASONS FOR DENYING THE WRIT

1. The trial court, in confirming the validity of the organization of the school district and denying the People's motion to vacate the decree, based upon the evidence in the case (Rec. Vol. III, pp. 1-108), found, inter alia, that the granting of the relief prayed in the quo warranto proceeding would result in great detriment to the public and that the People were guilty of laches (see Order Denying Petition to Vacate Decree, Rec. Vol. I, pp. 208-211).

2. Contrary to the assertions of Petitioners in their Petition (par. 1, p. 10), the long established application in Illinois of the doctrine of laches is not necessarily bottomed on the lapse of a particular period of time.

". . . What caused the action to be barred was neither the lapse of time nor the acquiescence of the plaintiffs, but, rather, the fact that during the period of delay and acquiescence certain action had been taken by the district and certain conditions had developed whereby great inconvenience and public detriment would result from a judgment of ouster . . . The basis for the decision was that the granting of the relief prayed for would be manifestly against the public interest, and the doctrine of laches was invoked for that reason.", *The People ex rel. Jordan v. Forest View*, 21 Ill. 2d 384, 390, 172 N.E. 2d 780, 784, (1961) (cited also by the Illinois Appellate Court in the case at bar, Pet. for Writ of Cert., Appendix A, pp. A-7-A-8); *The People ex rel. Zimmerman v. Jones*, 308 Ill. 246, 249, 139 N.E. 403 (1923) (cited also by the Illinois Supreme Court in the companion case to the case at bar, Pet. for Writ of Cert., Appendix D, p. A-17).

Further, even in terms of computation of time, Petitioners are in error. The People delayed for some eleven months in raising objections to the organization of the district, not six months as Petitioners claim (Pet. for Writ of Cert., p. 10, Appendix A, p. A-9). The Petitioners delayed well over a year.

An examination of these Illinois cases indicates no departure from long established principles applicable to the doctrine of laches.

3. Contrary to the assertions of Petitioners in their Petition (par. 2, pp. 10, 11), the Illinois Appellate and

Supreme Courts in denying Petitioners relief did not ignore the mandate of Illinois Supreme Court Rule 301 (Ill. Rev. Stat., Ch. 110A, Sec. 301) to the effect that "every final judgment of a circuit court in a civil case is appealable as of right . . .". In fact, it is the Petitioners who ignored and failed to use their clear right of appeal.

The quo warranto decree was entered January 8, 1968, and it did not become final and unappealable until the expiration of 30 days therefrom. Petitioners engaged Swain, Johnson & Gard as their attorneys on January 23, 1968, (Rec. Vol. I, p. C144, par. 3). There is no question but that Petitioners were fully aware of the entering of the quo warranto decree on January 8. They had until February 7, 1968 to avail themselves of the provisions of the Illinois Civil Practice Act to file a notice of appeal to perfect their own right of appeal as non-parties claiming to be aggrieved by the result of the decree since Illinois Supreme Court Rule 301 also provides "all rights that could have been asserted by appeal or writ of error may be asserted by appeal". The writ of error was historically in Illinois the method of appeal by a non-party (see Ill. Rev. Stat., Ch. 110, Sec. 74, repealed and now embodied in Illinois Supreme Court Rule 301. Repealed Section 74 reads in part "the right heretofore possessed by any person not a party to the record to review a judgment or decree by writ of error is preserved by notice of appeal."). Illinois Supreme Court Rule 301 also provides "The appeal is initiated by the filing of a notice of appeal. No other step is jurisdictional". Illinois Supreme Court Rule 303 (Ill. Rev. Stat., Ch. 110A, Sec. 303) provides "The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from".

Thus it is clear that the Petitioners had an independent, clear, and efficient remedy by way of a right of appeal which they either ignored or chose not to use. They failed to file a notice of appeal and pursue their remedy. When Petitioners sought to intervene in the proceeding, the quo warranto decree of January 8, 1968, had long since been final and unappealable as to the Petitioners under Illinois law.

Further, in paragraph 2 of their Petition for Writ of Certiorari, Petitioners assert that the Illinois Appellate and Supreme Courts affirmed the trial court following only oral argument on a motion which merely raised the question of Petitioners' right to appeal. This is simply not the fact. As stated in the Appellate Court opinion (Pet. for Writ of Cert., Appendix A, p. A-3) and as shown by the record, the Petitioners limited their appeal to the trial court's order denying them leave to intervene. This was the issue before the Appellate Court. The Court found that the Petitioners had not established a right to intervene and the trial court did not abuse its discretion in denying them leave to intervene under the particular facts of this case, the Petitioners being held guilty of laches in asserting their rights.

4. Petitioners in paragraph 3 of their Petition for Writ of Certiorari (p. 11) contend they were improperly denied the right to intervene to appeal and argue the merits of the quo warranto proceeding. Aside from the fact that the Petitioners failed to utilize their clear right of appeal as non-parties, it should be pointed out that throughout the contest with Petitioners the Respondents placed squarely before the trial court (Rec. Vol. I, pp. C163-164) and before the Appellate Court (Appellees' Motion to Dismiss Appeal, par. 5), inter alia, the fact that Petitioners were guilty of laches and that the alleged

rights of the Petitioners sought to be asserted by them are no greater than the right of the public generally with respect to which the trial court found to be best served by confirming the school district and denying ouster of the Board, any other result causing great harm to the public.

The essentials of the entire record in the quo warranto proceeding were before both the Illinois Appellate and Supreme Courts as it is established that the exercise of discretion on a motion to intervene is not reviewable unless clear abuse of discretion is shown, and it is not ordinarily possible to determine that question except in light of the whole record, *Allen Calculators v. National Cash Register Company*, 64 S. Ct. 905, 908, 322 U.S. 137, 88 L.ed. 1188. Further, Petitioners' brief on appeal presented not only their position on intervention, but also in general their position on the merits of the quo warranto proceeding (Brief for Petitioners-Appellants, pp. 17, 18, 19, 20), notwithstanding the fact that they limited their appeal to the denial of intervention by the trial court.

In connection with this entire proceeding, it is also important to note that the Petitioners squarely stated to the trial court that they were satisfied with the handling of this case by the State's Attorney at the trial level, that their problem was simply that the State's Attorney was not going to appeal and that the 30 day time period with respect to the quo warranto decree had elapsed (Rec. Vol. III, p. 226, Pet. for Writ of Cert., Appendix A, p. A-9). From this it can be properly concluded that the Petitioners had no additional or further evidence to offer in the case.

The Illinois trial, Appellate and Supreme Courts correctly found that Petitioners had not established their right to intervene in this case.

5. Petitioners claim that they had an agreement with the State's Attorney that an adverse decision in the trial court would be appealed. The Illinois Appellate Court properly disposed of that issue in its opinion (Pet. for Writ of Cert., Appendix A, pp. A-2-A-10). Further, it should be noted that there is absolutely no evidence of any kind in the record in this case substantiating such claim of Petitioners. Respondents have no knowledge of such alleged agreement and were not present at any time such alleged agreement was purportedly made. The only reference appears in the pleadings filed by Petitioners. "Errors assigned . . . must be based upon the record itself. They cannot rest upon mere agreement of counsel or on the fact that the question might be raised in the pleadings . . .", *People ex rel. Toman v. Belmont Radio Corporation*, 388 Ill. 11, 20, 57 N.E. 2d 479.

6. Petitioners claim the Illinois Appellate and Supreme Courts invoked new, novel procedural requirements and thereby foreclosed Petitioners' rights. This is simply not the fact. Petitioners failed to use their right of appeal clearly afforded by Illinois procedures and the doctrine of laches long established under Illinois law was consistently applied.

CONCLUSION

It is respectfully urged that the Petition for Writ of Certiorari in this case be denied. The Petitioners failed to use their clear right of appeal. The Petitioners were properly found guilty of laches under long standing Illinois cases on the basis of particular facts of this case. The existence of this large school district should be confirmed, any other result causing great detriment and harm to the public interest.

The Petition before this Court presents no proper grounds for review on certiorari.

Respectfully submitted,

KENNETH H. LEMMER,
WILLIAM M. GOEBEL
Counsel for Respondents.